

Appeal from a decision of the District Manager, Milwaukee District Office, Bureau of Land Management, repossessing four wild horses, and cancelling a Private Maintenance and Care Agreement for horses with Freeze Mark Nos. 87535883, 88535528, 90535861, and 92536039.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

BLM properly cancelled a Private Maintenance and Care Agreement for wild free-roaming horses and repossessed the horses when the adopter violated the terms of 43 C.F.R. § 4770.1(d) by placing an advertisement in a newspaper for the sale of the horses before title was issued by BLM, notwithstanding the fact that the adopter advised a potential buyer that the horses could not be sold until title issued.

2. Evidence: Sufficiency--Wild Free-Roaming Horses and Burros Act

A Private Maintenance and Care Agreement for wild horses is properly cancelled and the horses are properly repossessed by the Federal Government when there is sufficient evidence of improper care of the adopted horses to establish that the adopter violated the terms of the Agreement by "inhumanely treating" the horses, by allowing them to suffer stress and injury owing to action or failure to act that was not compatible with animal husbandry practices accepted in the veterinary community.

3. Evidence: Sufficiency--Wild Free-Roaming Horses and Burros Act

When BLM cancels a Private Maintenance and Care Agreement, the adopter has the burden of establishing that BLM's action was improper. The adopter's assertions

that the horses were well maintained, together with statements of third parties attesting to the good physical appearance of the horses, are insufficient to overcome physical evidence of substandard care and health problems.

#### 4. Wild Free-Roaming Horses and Burros Act

Under 43 C.F.R. § 4760.1(d), BLM has the discretionary authority to give an adopter of wild horses reasonable time to complete required corrective actions in lieu of immediate repossession of the horses and cancellation of the Private Maintenance and Care Agreement, or repossess the horses immediately. If the record establishes that some of the horses were suffering from severe hoof problems and all of the horses were kept in substandard facilities, BLM may properly repossess and cancel the Agreement without allowing for corrective action.

APPEARANCES: Larry Vanden Heuvel, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE TERRY

Larry Vanden Heuvel (Appellant) has appealed from a Decision of the District Manager, Milwaukee District Office, Bureau of Land Management (BLM), dated September 28, 1994, repossessing four wild horses, and cancelling his Private Maintenance and Care Agreement (Agreement) with BLM for horses assigned to Appellant under authority of the Wild Free-Roaming Horses and Burros Act of 1971 (the Act), as amended, 16 U.S.C. §§ 1331-1340 (1994).

By applications filed with BLM on March 20, 1991, and April 30, 1991, Appellant sought to adopt four wild horses pursuant to the Act, 16 U.S.C. § 1333(b)(2)(B) (1994). On March 20, 1991, and June 7, 1991, BLM approved Appellant's applications and on May 29, 1992, entered into the Agreement (Form 4710-9) for the private maintenance, protection, and welfare of four horses. 1/ Appellant did not possess title to these horses.

In his March 20, 1991, application to adopt two horses, Appellant described the facilities which he would provide for the horses as a "12'x 20' Barn 9' high" and a "100' x 100' Corral with 6' pipe fence." In his

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1/ The horses are described as follows: A bay mare (Freeze Mark-87535883, Signalment Key-HF1EDDEBB), a grey mare (Freeze Mark-88535528, Signalment Key-HF1AAAHG) a brown mare (Freeze Mark-90535861, Signalment Key-HF1AAADB), and a black filly (Freeze Mark-92536039, Signalment Key-HF1ADADBC).

April 30, 1991, application for the other two horses, he listed a "12' x 13' stall each animal" and a "20' x 20' corral each animal 6 ft. Plank & Pipe."

On September 21, 1994, BLM Compliance Inspector Gary M. Thompson advised Supervisory, Wild Horse and Burro Specialist, Arthur Digrazia, of an advertisement for the sale of mustangs in a newspaper. Having learned that these horses were adopted by Appellant, Thompson visited Appellant's property and inspected the horses in the presence of Mrs. Vanden Heuvel. (Memorandum from Thompson to Digrazia dated Sept. 21, 1994.) In a Wild Horse and Burrow Compliance Record dated September 21, 1994, Thompson made the following observations on the facilities at Appellant's farm:

Barn is an old cow barn with no individual stalls. Barn is divided only and has concrete floors. Shed attached to the barn where horses are initially housed when adopted is about 24' x 50' and has a concrete floor. This shed offers no access to the outside pens. The outside pens also have concrete bott[om]s and are constructed of four foot woven wire with 4" x 6" squares. A 2x4 has been nailed above the wire to bring it to a 6' height. The pen is approx 100' x 100' and is divided with loose 3 1/2 to 4' woven wire with 4" x 6" squares, an electric wire along the top of this divider brings it to approximately 5'. Water was by tank and hose refill.

Regarding the horses, Thompson stated:

Horses were in good body condition, however the hoofs of the bay mare and the grey mare were severely over grown. The bay mares hoofs were turned up at the toe causing difficulty in movement. The grey mares hoofs were cracked and breaking. The bay mare was dragging a 3/8" log chain about 20' long. While at the farm I observed the mare fall to the concrete floor because the end of the chain was tangled on the edge of a makeshift slip stall. Due to her wild nature I was unable to assist her and she was able to get up and untangle herself.

In a September 24, 1994, memorandum to the case file, Digrazia reported that Appellant met with him, Thompson, Ranger Mary Trautner, and Wild Horse and Burro Specialist Gabriel Beauvais at Appellant's property on September 22, 1994. 2/ Digrazia stated that the horses which Appellant had attempted to sell, the grey mare (Freeze Mark-88535528), the black filly (Freeze Mark-92536039), and the brown mare (Freeze Mark-90535861), were in good flesh. According to Digrazia, it was apparent that Appellant had worked all night trying to trim the grey mare's hooves. Like Thompson, Digrazia saw the bay mare (Freeze Mark-87535883) dragging a log

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2/ Digrazia reported the date of this visit as Sept. 23, 1994, but the chronology of events makes sense only if the date is Sept. 22, 1994.

chain attached to her halter. Although Digrazia described the bay mare as being in good flesh, he observed that her hooves were over grown to the extent they were turning upward and that she was in visible pain. He commented that "she is not gentle and falls down on the concrete area when she runs from you."

Digrazia described the sanitation in the pens where the horses have been kept since 1992 as "no less th[a]n filthy [with] approximately 24" of manure." He also noted make-shift stalls and concrete floors.

Digrazia reported that he presented Appellant with a certified letter signed by the Acting District Manager informing him that his Agreement was cancelled and that the horses were being removed from his property.

Digrazia stated that the decision to remove the horses from Appellant's care was based on the severity of the violations, the attempt to sell the horses, the inhumane treatment, the unsanitary and injurious living conditions, the log chain on the bay mare, and the make-shift corrals and concrete floors.

Photographs dated September 23, 1994, which were taken by BLM and included in the case file, document the hoof problems.

In its September 28, 1994, Decision BLM stated:

An inspection of your facilities and the animals you adopted performed on September 21st, 1994 by the BLM Compliance Officer revealed several violations of the Private Maintenance and Care Agreement. The facilities you described on your application were not present and the facilities you do have do not meet our guidelines. The animals were being maintained on concrete floors. Hoofs do not appear to have been trimmed since adoption in May of 1992 and are to the point of crippling the animals.

Based on this information, BLM determined that Appellant had violated the terms of his Agreement and 43 C.F.R. §§ 4750.4-1(e) and 4770.1(a), (d), (f) and (g). BLM notified Appellant that the animals would be removed immediately, and that his Agreement was cancelled. 3/

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3/ BLM's Decision of Sept. 28, 1994, was the second decision issued by BLM. In his Sept. 24, 1994, memorandum, Digrazia explained that the first Decision dated Sept. 22, 1994, omitted a reference to a violation of 43 C.F.R. § 4770.1(d). The Decision dated Sept. 28, 1994, from which this appeal is taken, is identical to the Sept. 22, 1994, Decision but with the addition of the reference to 43 C.F.R. § 4770.1 (a) and (d). The Sept. 28, 1994, Decision states that the horses will be removed from Appellant's care immediately, even though they were actually removed on Sept. 22, 1994.

Once in BLM custody, W. Dwight Hooton, DVM, examined the bay mare. In a November 2, 1994, letter to BLM, Hooton stated that on September 23, 1994, he anesthetized the bay mare in order to trim her feet. Dr. Hooton explained that the mare's hoof care had been badly neglected so that her 9-inch to 10-inch long (estimated) hooves from the coronary band to the tip of her toes were curled up and no longer contacting the ground during normal stance. According to Dr. Hooton, she appeared uncomfortable on both forefeet. Dr. Hooton reported that on October 27, 1994, the mare was still lame on both forelimbs, possibly due to previous episodes of laminitis. Dr. Hooton stated that the mare was not sufficiently handleable to allow a definitive lameness exam, but based on his observation and experience, he thought her prognosis for soundness was guarded.

In his Statement of Reasons (SOR), Appellant asserts that all of the horses received daily care with grain, hay and fresh water. Appellant states that, with the exception of the bay mare (Freeze Mark No. 87535883), all of the horses were on pasture. Appellant acknowledges that the bay mare has a "very bad foot problem." According to Appellant, he spent hours with this horse attempting to trim her hooves, but the horse was scared and did not like being touched on her head or front legs. (SOR at 1, 3.)

Appellant relates that veterinarian Jay Triick saw the horses in the fall of 1992 when he worked on the hooves of three of the horses, but had difficulty with the bay mare. In the spring of 1993, Appellant states that he asked Dr. Triick if the bay mare could be tranquilized in order to work on her hooves, but that Triick advised against it, because it would take too much tranquilizer to calm her which might endanger her life. Appellant does not believe that he neglected the horse, but asserts that he was only following Triick's advice. 4/ (SOR at 5.)

Appellant explains that his progress with the horses was hindered in the summer of 1992 when he experienced physical problems as the result of being dragged by a horse, and again in 1993 and 1994 when he broke a thumb which required surgery. (SOR at 4.)

Appellant states that he attempted to find someone to help with the horse, without much success. Appellant asserts that he "tried to stimulate some interest in my wild horses" by placing an advertisement in the paper which featured mustangs along with other horses for sale. Laura Checolinski responded to the ad and expressed interest in a mustang. Appellant says that he told her that the mustangs could not leave his farm until title was received. Appellant says Checolinski came to the farm almost every day for a week and a half to work with one of the mustangs and offered to help with the bay mare. (SOR at 6.)

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4/ We note that Appellant's reliance on the advice of Dr. Triick regarding the trimming of the bay mare's hooves is weakened by his statement that Dr. Triick "does not work with many wild horses." (Supplemental SOR at 3.)

Appellant states that he resigned from his job on September 28, 1994, to "devote whatever time was necessary to the horses." (SOR at 6.)

Appellant understands now that he should have contacted BLM, but did not know at the time that BLM had people who could have worked with the bay mare. (SOR at 7).

Appellant provides the following information regarding the facilities for the horses:

I know my farm is no showplace, and that you [BLM] have a lot of video footage, showing the worst of it, but there are pastures for the horses. They are not just on concrete. All but [the bay mare], stay in any fencing & can be c[a]ught, so I do not have the same pens, I had when adopting.

[The bay mare] is most often kept in a front stall, which is wood block & dirt floor. She also has a patio outside, which has a 6'[foot] fence. It has cement floor. I've reread my contract and do not find this to be prohibited anywhere in the contract.

When [the bay mare] is in the back pens, she can go from one to the next. The back loafing barn has dirt pads, built up to stand and lay on.

(SOR at 7.)

Appellant expresses continuing interest in the horses, and asks that they be returned to him. (SOR at 8.)

In a supplemental SOR, Appellant emphasizes that he followed Dr. Triick's advice not to trim the bay mare's front hooves until she could be calmed, because tranquilizing her could endanger her life. Appellant includes signed statements verifying that he attempted to find help with the animals. One of the statements shows that he requested help with trimming the hooves of the bay mare. Two of the letters attest to the good physical appearance of the animals. Dr. Triick also provided a statement in which he reported that the horses were well fed and cared for. He confirmed that he told Appellant that "it would not be to the best interest to sedate the [bay mare] as it would have to be done repeatedly." He advised Appellant that he should give the horse back, get rid of it or put it down. In her statement dated September 29, 1994, Laura Checolinski confirmed that Appellant told her he could not sell the horse until he received title to it.

Appellant refers to 43 C.F.R. § 4760.1(d) which provides that an officer may require, as a condition of continuation of the agreement, that an adopter take specific corrective actions if the officer determines that the animal is not receiving proper care or is being maintained in unsatisfactory conditions. The regulation provides that the adopter shall be given reasonable time to complete required corrective actions. Appellant believes that this regulation is applicable to his situation.

The Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1333(b)(2)(B) (1994), authorizes the Secretary of the Interior to place wild horses with qualified applicants who can assure humane treatment and care. See 43 C.F.R. Subpart 4750. Title to horses placed in private care remains with the Government for a minimum of 1 year after placement and execution of the Agreement and until BLM issues a Certificate of Title.

16 U.S.C. § 1333(c) (1994); 43 C.F.R. §§ 4750.4 and 4750.5. Regulations 43 C.F.R. §§ 4760.1(a) and 4770.1(g) require the adopter to comply with the Agreement and the regulations.

[1] Regulation 43 C.F.R. § 4770.1(d) prohibits selling or attempting to sell, directly or indirectly, a wild horse prior to passage of title. Appellant placed an advertisement in the September 13, 1994, edition of the West Bend Booster for the sale of mustangs. He has not denied that this advertisement described horses covered by his Agreement. The advertisement is confirmation of the fact that Appellant attempted to sell the horses within the meaning of 43 C.F.R. § 4770.1(d), notwithstanding the fact that he advised a potential buyer that he could not sell the horses prior to issuance of title.

[2] The Private Maintenance and Care Agreement (Form 4710-9) specifically prohibits "[t]reating a wild horse or burro inhumanely." See also 43 C.F.R. § 4770.1(f). Regulation 43 C.F.R. § 4700.0-5(f) defines "inhumane treatment" as "any intentional or negligent action or failure to act that causes stress, injury, or undue suffering to a wild horse or burro and is not compatible with animal husbandry practices accepted in the veterinary community." 5/ The Board has upheld BLM's decision to cancel the Agreement and repossess the horses pursuant to these Agreement terms and regulations when there is evidence that the adopter failed to provide feed, water, and care. See Mark L. Williams, 130 IBLA 45, 48-49 (1994); Freddie R. Mason, 126 IBLA 28, 29 (1993); Grant F. Morey, 108 IBLA 354, 356 (1989); Dennis Turnipseed, 66 IBLA 63, 67 (1982). Documents in the Compliance Record describing the severe hoof problems of the bay mare and grey mare and the substandard condition of the facilities, and Digrazia's memorandum describing the bay mare's pain and the unsanitary and unsafe living conditions, are evidence that Appellant failed to provide proper care for the horses. Further evidence of the bay mare's hoof problems is provided by BLM's photographs which show the bay mare's hooves turning upward and not making contact with the ground during normal stance.

[3] When BLM cancels an Agreement, the adopter has the burden of establishing that such action was improper. Thana Conk, 114 IBLA 263, 276 (1990); Esther E. Lenox, 102 IBLA 224, 227 n.4 (1988); Mary Magera, 101 IBLA 116, 119 (1988). Appellant has not met this burden. He admits

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5/ This is not to imply that Appellant was deliberately cruel to the horse. Inhumane treatment may be as much the result of neglect as design. Esther E. Lenox, 102 IBLA at 228 n.6; Kathryn E. Spring, 82 IBLA 26, 30 (1984).

that the bay mare had a foot problem. Furthermore, Appellant's assertions that the horses were well maintained, and the statements of third parties attesting to the good physical appearance of the horses, are insufficient to overcome the evidence of substandard care and health problems submitted by BLM. Nor is Dr. Triick's statement sufficient to overcome the findings of Dr. Hooton regarding the condition of the bay mare.

Appellant's admitted inability to care for the horses as a result of his own physical injury does not excuse him from the duty to care for the animals. William J. Ahrendt, 132 IBLA 126, 129 (1995). While we do not doubt that Appellant needed help with the horses and attempted to find it, the care of these horses was his responsibility. See 43 C.F.R. § 4750.4-1(e). Under the circumstances described by Appellant, the humane course of action would have been to have requested voluntary termination of his Agreement pursuant to 43 C.F.R. § 4750.4-3. See Vickie L. Fontenot, 121 IBLA 47, 51 (1991).

[4] Appellant asserts that under 43 C.F.R. § 4760.1(d), BLM should have required corrective action with regard to the care of the horses and provided a reasonable amount of time to complete the required corrective actions, rather than effecting immediate repossession and cancellation of the Agreement. It is within BLM's discretion to repossess a horse immediately or allow additional time to respond. See Thana Conk, 114 IBLA at 277; Esther E. Lenox, 102 IBLA at 228 n.7. Thus, in view of the severe hoof problems of the bay mare and grey mare, and the substandard facilities provided for the horses, it was well within BLM's authority to repossess the horses and cancel the Agreement under the regulations, without allowing Appellant additional time to take corrective action.

Additionally, in its Decision, BLM stated that Appellant made misrepresentations in his applications for adoption concerning the facilities to be provided for the horses. It is unnecessary to consider this issue, as the record reveals adequate grounds as discussed above for the repossession of the horses and cancellation of the Agreement.

Accordingly, pursuant to the authority delegated the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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James P. Terry  
Administrative Judge

I concur:

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R.W. Mullen  
Administrative Judge